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BACKGROUND AND NATURE OF THE HAWAII
ENVIRONMENTAL IMPACT STATEMENT SYSTEM

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## Introduction

I am pleased to have been given the chance to discuss the new State Environmental Impact Statement (EIS) system for this workshop because, in the University of Hawaii Environmental Center, we have been especially concerned with the objectives of EIS's, the development of EIS systems, and the potentials and limitations of various EIS systems with regard to meeting the objectives. We have reviewed a considerable fraction of all Hawaiian EIS's generated under the National Environmental Policy Act, under the Governor's executive order, and under the Act establishing the new State system, as well as most pertinent Hawaiian legislation and regulations.

I can summarize our general opinions on EIS systems in three statements.

1. No EIS system can by itself fully accomplish its fundamental objectives.

2. Every system has its own special limitations.

3. The success of any system will depend very substantially on the attitudes of those who are responsible for the statements, those who actually prepare them, those who review them, those who accept them, and those who use their information in making decisions.

Objectives

Both the potentialities and actual operations of any system are properly evaluated in the light of the system objectives. It seems to me that the objectives of an EIS system may best be discussed in two parts:

1. Aims, toward whose accomplishment an EIS system can contribute but that can never be fully accomplished; and

2. Goals, that EIS systems in general or a specific EIS system are intended actually to accomplish.

The fundamental aims are best discussed in the light of the concerns of what may be called the environmental movement. I take it for granted that the ultimate aim of an EIS system is identical to the appropriate aim of our social system, the maximum general, long-term welfare of people.

Particularly in western nations, overall human welfare has been clearly improved in material aspects over the last few centuries. Only in the last decade or so, however, have come general recognition:

1. That our environment has been changed substantially by the processes we have used to maximize material welfare;

2. That present maximization of material welfare has been made difficult by some of the environmental changes resulting from past actions;

3. That in non-material ways many of the environmental changes are detrimental;

4. That the non-material effects are much more important that we had earlier realized;

5. That the process of environmental degradation is continuing; and

6. That so extensive a sacrifice of non-material benefits and long-term material benefits to short-term material benefits was unnecessary in the past and will be unnecessary in the future.

Like all great human movements the environmental movement is far from homogeneous. There are those who would like it to be a back-to-nature movement. Because the human race has evolved in adaptation to nature, human welfare requires a considerable amount of environmental naturalism. Nevertheless, I am inclined to express the proper aims of the movement as improvement of the processes of planning and decision-making so that they better reflect long-term and overall welfare of people, recognizing non-material as well as material aspects.

This aim may be accomplished only by a combination of an increase in the concern of decision makers for long-term and non-material effects of their decisions, and increase in the information available to the decision makers as to these effects.

The information must relate not only to the effects of undertaking actions proposed, but to the effects of alternatives to those actions, including no action.

The function of EIS systems is to provide decision makers with such information. By itself an EIS system does not change loci of decision making, does not substitute new decision makers, and does not change the attitudes of decision makers. Hence it can only contribute to the accomplishment of the fundamental aim. The specific aim of an EIS system is, thus, the more restricted one of providing the best practicable information on the environmental effects of human importance that will result from proposed actions and alternatives to them.

None of us is capable of taking into account simultaneously all effects of all actions and all alternatives. Our social systems necessarily provide for divisions of effort, and governmental systems within them similarly provide for divisions of oversight responsibility. In one respect, EIS systems represent further subdivision in that each EIS relates to a specific proposed action.

The collation of something akin to the information provided by EIS's as bases for the broadest planning decisions of governments would contribute substantially to the improvement of overall policy, but it is questionable that EIS systems as such, designed to relate to more or less discrete actions or at best to groups of similar actions, is quite what is needed in the overall planning and policy making. In spite of the limitation as to the discrete nature of the actions to which it pertains, an EIS system does bridge societal and governmental divisions. It relates to actions proposed to be undertaken by all departments, and may relate to actions privately undertaken but subject to governmental approval. Further, each EIS is supposed to provide information on all significant effects of, and all reasonable alternatives to, the action to which it relates, regardless of the limits of departmental authority.

An EIS is, therefore, a document that is intended to present sufficient information on all environmental consequences of a proposed action to optimize decisions on whether and how the action should be undertaken in terms of overall, long-term human welfare.

## History of EIS systems and major limitations in their scope of application

Every EIS system so far implemented has actual goals that are more specific than the overall aim of providing environmental information adequate to serve as a basis for wise decisions on the undertaking of projects in general. The most obvious limitations as to specific system goals relate to the scope of actions for which EIS's are required under the several systems. The primary scope limitations are jurisdictional in nature. The first system to be established, that called for by the National Environmental Policy Act of 1969, is limited to federal actions--those in which federal lands or funds are to be used. The limitation is certainly in line with and may be dictated by the limitations on the federal government under the national Constitution.

EIS systems have since been established by several states. Our original system, that established by an executive order of the Govenor in August 1971, was one of the first. It was necessarily limited to state actions, that is those undertaken with state funds or on state lands. Some of the state systems, however, extend to the actions of local as well as state governments and to certain kinds of private actions, and this is true of the system established under Act 246 (1974).

This Act, now Chapter 343 of Hawaii Revised Statutes, requires EIS consideration for proposed state actions, proposed county actions, and such private actions as are proposed in the conservation land use district, in the shoreline setback area or 300 feet seaward of it, at a registered historic site, in the Waikiki-Diamond Head area of Oahu, or will require special county general plan amendments resulting in designations other than agriculture, conservation, or preservation.

Limitations of the general sort provided in Act 246 are rational, particularly in a new system. The costs of an EIS system are considerable. Until a new system is tested in actual practice, its cost effectiveness is somewhat uncertain. Initial limitation in scope to the kinds of actions that are likely to have the greatest environmental impact is sensible.

One may question the wisdom of the limitations in detail. The limitation to the 20 to 40 foot-wide shoreline area defined by the shoreline setback law seems inconsistent with the concerns over development in a broader part of the coastal zone that resulted in the passage of the Shoreline Protection Act of 1975 with its "special management area" of 100-yard width. However, the limitations must be accepted unless and until the EIS law is amended.

Other limitations (and potentialities)
in scope of EIS applicability

Detailed examination of Act 246 and of the rules and regulations developed pursuant to the Act by the Environmental Quality Commission discloses additional limitations and potential limitations as to the scope of applicability of the EIS system and more especially the EIS's that are required by it.

First and most definitively, as called for in the Act, the Commission has listed in its Regulations a number of types of action which, it is presumed from their nature and magnitude, "will probably have minimal or no significant impact on the environment" [343-5(6)]. Clearly, the provision of such a list is appropriate, and with minor exceptions the actual list of 10 types is appropriate when it is coupled with the exception immediately following in the Regulations.

Second, and more potentially than definitively, there is a limitation that I can discuss only by reference to details in the language of the Act. With respect to either a governmental action--that is one proposed by a State or county agency that will use state or county lands or funds--or a private action in one of the five prescribed categories, the EIS "shall be required" only if the action "will probably have significant effects" [343-4(a)]. This might appear to be a major limitation. An EIS that might disclose significant effects is actually required by the Act only if, before it is prepared, it is clear that significant effects are probable.

The limitation is not as great as might seem. The determination whether or not an EIS is to be required must be made, according to the Act, on the basis of an assessment by the proposing agency in the case of a governmental action [343-4(b)], or by the approving agency in the case of a private action [343-4(c)]. By the Regulations the assessment is to result in a document that can be regarded as a mini-EIS [1:30]. The Act then authorizes the requirement of an EIS if the proposing or approving agency, respectively, finds that the action "may have a significant effect on the environment" [343-4(b) and (c)].

The overall effect, then, is that if an action will probably have a significant effect, an EIS shall be required, if it may have a significant action an EIS may be required, and if it is in one of the 10 categories that are presumed will probably not have a significant effect an EIS will not be required.

Judgments as to the distinctions between probable, possible, and improbable effects are unavoidable. There is clearly the potential that EIS's will be called for as appropriate. However, there is considerable reason to believe that an agency will not require of itself that it prepare an EIS for an action that it merely suspects may have a significant environmental impact. We have evidence in recent decisions that even approving agencies may give the benefit of doubt to private applicants.

There would be no check on decisions not to require EIS's except that these decisions must be documented and made public [343-4(b) and (e)]. On review of the assessments resulting in some of these negative decisions, we have found some cases in which the rationale was sound but the documentation inadequate. More seriously, we have found cases in which EIS's have not been required for projects clearly to be undertaken for the sake of their environmental impact, beach erosion control and flood control projects, for example. The impacts intended are clearly beneficial ones, at least from the standpoint of individuals or select populations, but the history of such projects is replete with examples of unintended detrimental side effects of exactly the sort that EIS's are intended to identify and evaluate.

Incidentally, the EIS system flow charts that were distributed for this meeting, both those pertinent to agency-proposed actions and those pertinent to applicant-proposed actions, not only indicate that comments on negative declarations will be accepted from the public but also suggest that determinations may be reconsidered on the basis of such comments. Nothing in the Regulations seems to require this. Our experience suggests that agencies will respond to comments, but we are not aware of any reconsiderations.

Potentialities as to coverage of environmental impacts

When it comes to the identification and evaluation of the environmental effects of an action in an EIS, if one is required, the potentialities of the new State system seem essentially unlimited, at least by the prescriptions of the system. No time limits are set to the process of preparing the EIS, though those from whom comments are solicited by the preparers are limited in the time they can take in responding [1:41b]. No cost limits are set to the process.

The content prescriptions although expressed as minimum requirements [1:42], are as comprehensive as could be expected. Some redundancy as to probable impact [1:42e], unavoidable adverse environmental effects [1:42f], and irreversible commitments of resources [1:42g] is explicable on the basis of desirable emphasis on what is adverse, irreversible, or both. The possible interpretation of the content requirements as specifications for standardized form, a limitation in the case of federal EIS's, is guarded against in the instructions as to style [1:43]. The identification of possible alternatives to the action proposed is required, and another potential limitation of the federal system is eliminated in the requirement for discussion of the environmental effect of the alternatives.

The general instructions on the preparation of an EIS [1:40] contain the following admonition: "An EIS is meaningless without the conscientious application of the EIS process as a whole, and should not be merely a self-serving recitation of benefits and a rationalization of the proposed action." Such an admonition should not, in theory, be necessary, but the desirability of its inclusion is indicated to us by the tenor of many EIS's we have reviewed and by the shocking statement, attributed recently in the press to an agency representative, that a new EIS will have to be prepared for a certain action because under the new Regulations, the EIS must represent a full disclosure and not a self-serving rationalization. EIS's were never intended to be self-serving rationalizations.

There will, of course, be limitations. It cannot be expected that the identification of environmental impacts will extend beyond the limits imposed by available means of prediction or their evaluation beyond the limits imposed by available analytic methods. These limitations will generally be most serious with respect to the impacts of actions on the social environment.

There should logically be a limitation, too, relative to the severity of the effects anticipated. There would be no sense to requiring analysis in such detail that the sum of the costs of the analysis, and of reproduction, distribution, review, and processing the EIS would exceed either the benefits or the environmental detriments of the action.

## Potentials and limitations related to EIS preparation responsibilities and the review process

In the California EIS system, responsibility for preparation of an EIS for a private action rests with an agency with approval powers, for example, a county planning department. Such an agency may be unbiased with respect to the action, and hence likely to be objective in the preparation of the EIS. However, this placement of responsibility tends to result in the preparation of the EIS late in the planning process for the action, and hence to decouple the consideration of the environmental effects from the development of the plans.

In our system the responsibility for preparing the EIS rests on the proposer of the action to which it relates. The coupling of plan development with impact analysis thus made possible should lead to the proposal of plans whereby the environmental detriments of the action will be minimized.

We have to recognize, however, that this placement of responsibility, introduces a risk of bias in the EIS. This risk can only be offset in the review and acceptance processes. Our experience in EIS reviews indicates that the bias tendency is substantial and the offset only partially effective. The limitations result from the provisions in the system for review, for the response to review comments, and for the acceptance of the EIS's.

The number, competence, and diversity of reviewers of an EIS are potentially unlimited, but it must be recognized that no agency has actual responsibilities for the reviews of EIS's pertaining to either state, county, or private actions. The Act makes no explicit pertinent provision, and the Commission seems disinclined to assume any responsibility in this respect.

The time available for review is limited to 30 days [1:61]. Some limitation is appropriate, and although in our experience the 30 days poses difficulties, it is perhaps not unreasonable.

More serious are the limitations to the handling of review comments. Responses to comments received during the 30-day period are required by both the Act [343-4(b) and (c)] and the Regulations [1:61 and 62]. The responses supposedly include point by point discussion of the validity and significance of the comments and attempts to resolve differences of opinion [1:62]. It is our experience that the responses are often superficial. There is no recognized procedure for further comment on responses deemed inadequate by the reviewers.

Potentialities and limitations related to EIS acceptance responsibilities

Judgment whether an EIS is acceptable or not, including the judgment whether or not it adequately responds to review comments, rests with the Governor in the case of a state action [343-4(b)(1); 1:72a], with the Mayor in the case of a county action [343-4(b)(2); 1:72a], and with the approving agency in the case of a private action [343-4(c); 1:72b]. An agency may be presumed a competent and unbiased judge of the acceptability of an EIS if it is not the proposer of the action to which the EIS relates. It may be questioned, however, whether the chief executive of the state or a county is unbiased with respect to an EIS produced and recommended for acceptance by an agency under his jurisdiction, especially if no other agency under his jurisdiction has provided adverse criticism. Here, in our judgment, is a limitation not present in the original state EIS system because the Office of Environmental Quality Control reviewed and advised on the acceptability of EIS's pertaining to actions proposed by other state agencies. Act 246 does not provide for the continuance of this function by the Office and provides for its exercise by the new Commission only to the extent that recommendations are sought by a proposing agency in the case of governmental action or by applicant or accepting agency in the case of a private action.

The Governor's executive order under which the old system operated has not been revoked, but it is inconsistent with the Act in many respects. It is presumably within the power of the Governor to continue the powers of the Office with respect to State agency EIS's. It is presumably within the powers of the mayors to provide equivalent powers to appropriate county agencies with respect to County agency

actions. Potentially serious limitations to the EIS system will be eliminated if they will do so.

Two further limitations applicable to all EIS's should be recognized. The first relates again to the response to review comments. The 14-days allowed by the Regulations for the incorporation of responses in an EIS [1:62] will in many cases not permit revision of the EIS but merely appending to the comments and responses. The judgment of the accepting authority is made more difficult by the separation of the comments and responses from the EIS content to which they relate. In the case of private actions the time limit is required by the Act in its prescription that the entire process of review and acceptance shall be accomplished in 60 days [343-4(c)], but this requirement does not apply in the case of government actions.

The second general limitation is presented by the confusion between the acceptance of an EIS and the approval of the action to which it applies. The Act indicates that an EIS is acceptable if it adequately describes the environmental impacts of the action to which it pertains [343-1(1)]. The Regulations add further clarification [1:4a]. Yet the confusion remains, and indeed is likely to be strengthened by the suggestion in the general flow chart distributed for this meeting that an action unidentified but likely to be interpreted as the action may "proceed" upon judgment that an "EIS is acceptable." The flow chart for agency-proposed action even suggests that if the EIS is accepted the agency shall proceed with the action. Only in the flow chart for applicant-proposed action is it indicated correctly that what proceeds when an EIS is accepted is the approval process. In the case of both government and private actions, the undertaking of the action cannot proceed if the EIS is not acceptable. If it is acceptable the decision to undertake the action or permit its undertaking, the "approval process," is a separate decision, depending only in part on the environmental impacts disclosed in the EIS. The tendency toward deliberate understatement of environmental impacts is greatly increased if the preparers of EIS's do not realize that an action may quite appropriately be approved and undertaken even if its environmental effects may be quite detrimental, providing its social benefits will be very great.

Limitations on and potentialities for repeated EIS requirement

The Regulations require appropriately that the assessment of the environmental impacts of an action proposed by an agency begin early. With their early consideration, the potential impacts may best be dealt with in the preparation of the plans for the action. Private proposers of actions would do well to consider as encouragement to themselves what is a requirement of an agency.

There are both advantages and disadvantages in the early preparation submittal and processing of an EIS, however. On the one hand, if the EIS is not prepared and reviewed early, impacts brought to attention by reviewers cannot be considered in the plan development. On the other hand if the EIS is prepared and reviewed early, impacts dependent on details in the plans cannot be evaluated.

Both the Act and the Regulations provide that when an EIS has formally been accepted, no other statement may be required for the action [343-4(g); 2:00]. However, the Regulations qualify this provision. If the scope of the action or intensity of its impacts are increased, mitigating measures are decreased, or if new circumstances or evidence bring to light different or increased impacts not adequately dealt with, a supplemental EIS may be required on the grounds that the action is no longer what was originally proposed. For a major project involving a long planning process, the qualification removes a potentially serious limitation to the effectiveness of the EIS system.

Potentialities and limitations in appeals

The judgments of the chief executive of the state or county (or the approving agency in the case of a private action) are not necessarily final. Judgments as to the non-acceptability of an EIS pertaining to a private action may be appealed to the Commission by the applicant, and the Commission in this case may reverse the decision of the approving agency [343-4(c)]. Failures to determine whether an EIS is necessary or not or the undertaking of action without such determination [343-6(a); 1:81a], determinations that an EIS is necessary or is not necessary [343-6(b); 1:81b], and judgments as to the acceptability of an EIS [343-6(c); 1:81c] may be appealed to the courts. There are time limits for appeals, as is appropriate. There appear to be no special limitations as to standing with respect to appeals on the determinations or their lack. However, standing with respect to an appeal on the acceptance or non-acceptance of an EIS is limited to affected agencies or to persons who will be aggrieved by the action and who, additionally, in the review process have provided written comments specific to the issues on which the appeal is based. The extent of grievance necessary to give standing is not spelled out, and perhaps should not be. Nevertheless, this last limitation is a serious one. Suppose that a person learns for the first time that he will be affected by some detrimental impact of an action when he reads comments appended to the final EIS. Even though the effect on him may be serious, and even though he may have commented in the review process on other potential impacts, he is foreclosed from appealing.

Summary

In summary, my opinions as to the new Hawaii EIS system are entirely consistent with, but more specific than, those I expressed initially with respect to EIS systems in general:

1. This system cannot by itself fully accomplish its fundamental objectives.

2. As compared with one or more other EIS systems:

   a) Its special limitations seem to relate to:

      *i)* Its failure to extend to all private actions of current environmental concern;

      *ii)* The latitude given to proposing agencies to exempt their actions from EIS preparation;

*iii)* The bias introduced by placing the responsibility for EIS preparation with the proposers of the actions to which they relate;

*iv)* The lack of centralized review authority;

*v)* Time and other limitations on the handling of responses to review comments;

*vi)* The bias introduced by placing EIS acceptance authority with the chief executives of governments whose agencies propose the action to which the EIS's relate; and

*vii)* Limitations on standing to appeal EIS acceptances.

b) Its special potentialities seem to relate to:

*i)* Its extension to certain categories of private action;

*ii)* Its encouragement of early impact assessment;

*iii)* Its freedom from prescriptions as to form, as distinct from content of EIS's;

*iv)* Its admonition against self-serving aspects;

*v)* The stimulation of coupled impact consideration and plan development resulting from the placement of EIS preparation responsibilities on the proposers of the actions to which they relate;

*vi)* Its provision for supplemental EIS's;

*vii)* Its provision for appeals; and

*viii)* The general tenor of the Regulations under which it is to be operated.

3. The success of the new system will depend very substantially on the attitudes, of those who are responsible for the statements, those who actually prepare them, those who review them, those who accept them, and those who use their information in making decisions.